

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of

Review of the Commission’s Broadcast and	)	MB Docket 98-204
Cable Equal Employment Opportunity Rules	)	MB Docket 16-410
and Policies	)	

To The Commission

**REPLY COMMENTS OF THE MULTICULTURAL  
MEDIA, TELECOM AND INTERNET COUNCIL**

The Multicultural Media, Telecom and Internet Council (“MMTC”) respectfully replies to the January 30, 2017 Comments of NCTA – The Internet and Television Association (“NCTA Comments”), the January 30, 2017 Comments of the United States Telecom Association (“USTelecom Comments”), and the January 30, 2017 Comments of the American Cable Association (“ACA Comments”).<sup>1</sup> Petitioners Sun Valley Radio, Inc. and Canyon Media Corporation (“Petitioners”) submitted an internet recruitment proposal that was designed for broadcasters. In their comments, NCTA, USTelecom and ACA urge the Commission to extend it to MVPDs. According to ACA,<sup>2</sup>

The petitioners’ rationale applies equally to both broadcasters and MVPDs’ recruitment practices, and the Commission has long sought to ensure conformity between the two sets of rules [citing *Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies (Second Report and Order)*, 17 FCC Rcd 24018 ¶1 (2002), and noting that the MVPD EEO rules are expressly authorized by 47 U.S.C. §554 (1984)]. The Commission should ensure conformity between the two sets of rules again, by recognizing that the use of Internet-only recruitment sources by both broadcasters and

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<sup>1</sup> MMTC has reviewed all of the Comments in the new MB Docket 16-410. Unlike every previous comment round in EEO rulemaking dockets since the first one in 1967, not a single commenter in MB Docket 16-410 contends that the EEO Rule is unimportant, has outlived its usefulness, is not entitled to respect, or is not in the public interest. In this respect, the broadcasting, cable and telecom industries have achieved a civil rights milestone.

<sup>2</sup> ACA Comments, pp. 5-6. *See also* NCTA Comments, p. 1 (noting that recruitment rules for broadcasters and MVPDs currently are “identical”); USTelecom Comments, p. 3 (noting that “where the Commission previously considered changes to its EEO rules, it appropriately considered reforms for both MVPDs and broadcasters.”)

MVPDs meets the existing requirement to widely disseminate information concerning full-time job vacancies.

MMTC agrees. As discussed *infra*,<sup>3</sup> the desirability of applying EEO rule reforms to other industries provides a textbook illustration of why the Commission should embrace the concept of “platform neutrality” irrespective of whether it ultimately elects to restructure its bureaus by function (economics, engineering, law and policy), as has been suggested,<sup>4</sup> rather than continuing the Commission’s current organization by silo (media, wireline, wireless).

Presently, FCC EEO regulation is covered by a hodge-podge of somewhat different rules dating back many years. These rules cover broadcasters<sup>5</sup> and common carriers,<sup>6</sup> as well as cable and satellite distributors (“MVPDs”).<sup>7</sup> Major differences among the rules include the number of recruitment initiatives a reporting unit must engage in, different time periods for when these recruitment initiatives must occur, religious affiliation requirements, and the implementation of reporting requirements.<sup>8</sup>

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<sup>3</sup> See pp. 5-7 *infra*.

<sup>4</sup> See, e.g., Mark Jamison, Can We Modernize the FCC? Tech Policy Daily, February 2, 2017, available at <http://www.techpolicydaily.com/communications/can-modernize-fcc/> (last visited February 12, 2017).

<sup>5</sup> 47 C.F.R. §73.881, 47 C.F.R. §90.168, and 47 C.F.R. §73.2080. These rules date to 1968. See *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in their Employment Practices, Report and Order*, 18 FCC2d 240 ¶1 (1969) (citing *Nondiscrimination in the Employment Practices of Broadcast Licensees, Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 FCC2d 766 (1968)).

<sup>6</sup> 47 C.F.R. §22.321, 47 C.F.R. §101.311, §101.3 and §101.4. See *Rule Making to Require Communications Common Carriers to Show Nondiscrimination In Their Employment Practices, Report and Order*, 24 FCC2d 725, 729 ¶¶9, 11 (1970).

<sup>7</sup> 47 C.F.R. §§21.920, 25.601, 74.996, 76.71, 76.73, 76.75, 76.77, 76.79, 76.1702, 76.1702, 76.1802, and 100.51. See *Second Report and Order, supra*, 17 FCC Rcd at 24019 n. 1; see also *Amendment of the Commission’s Rules to Require Operators of Community Antenna Television Systems and Community Antenna Relay Station Licensees to Show Nondiscrimination in Their Employment Practices, Report and Order*, 34 FCC2d 186, 196 ¶22 (1972).

<sup>8</sup> Compare, e.g., 47 C.F.R. §§73.2080(c)(1) and (2) with 47 C.F.R. §76.75(b)(1) and (2), and with §§76.77.

Presently no EEO rules cover Title I information services. However, the rapid emergence of digital technology, and widespread reports of deeply exclusionary employment practices, necessitates that the Commission consider whether, and how, to exercise such EEO authority as it might possess over information service companies. Last week, a landmark comprehensive report, *Breaking the Mold: Investing in Racial Diversity in Tech: A Report for Investors*,<sup>9</sup> rendered these disturbing findings:

Black people, Latinos and Native Americans are underrepresented in tech by 16-to-18 percentage points compared with their presence in the U.S. labor force overall [citing [www.dalberg.com](http://www.dalberg.com)]. Black people and Latinos each comprise just 5.3 percent of the Professionals [citing [www.eeoc.gov](http://www.eeoc.gov)] category in U.S. tech industry labor data [citing [www.eeoc.gov](http://www.eeoc.gov)].

While Asians are represented at a higher rate in the tech workforce than the private sector overall, white people are 1½ times more likely than Asians to rise to an executive rank [citing [www.c.ymcdn.com](http://www.c.ymcdn.com)].

Among people of color who do enter the industry, many report isolation, discrimination and toxic work environments that prompt them to take their talent elsewhere. People of color leave tech at more than 3.5 times the rate of white men [citing [www.mercurynews.com](http://www.mercurynews.com)].

Yet tech companies' efforts to address the lack of racial diversity have not resulted in real change. A growing number of U.S. tech companies have begun releasing annual updates on diversity. These releases typically are accompanied by statements promising change and describing new diversity-related efforts — to the tune of an estimated industry investment in diversity of up to \$1.2 billion in the past five years, according to Intel/Dalberg [citing [www.dalberg.com](http://www.dalberg.com)]. Often, investment comes in the form of money and resources poured into diversifying tech talent pipeline programs at nonprofits and universities. Many companies also have implemented staff training in unconscious bias, as well as employee affinity groups based on race, ethnicity, gender, sexuality, or physical ability — while these are all worthwhile activities, additional efforts are needed to see real change.

[D]espite these efforts, racial and ethnic minorities have made scant progress over the past 15 years, securing only 1 to 2 percentage points more of the available jobs [citing [www.dalberg.com](http://www.dalberg.com)].

At the top, doors are shut to most people of color. Only 2 percent of tech executives are black and 3 percent are Latino [citing [www.eeoc.gov](http://www.eeoc.gov)].

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<sup>9</sup> Open Mic, *Breaking the Mold: Investing in Racial Diversity in Tech: A Report for Investors*, February 8, 2017, available at <http://breakingthemold.openmic.org> (last visited February 12, 2017).

The Commission cannot ignore this. As important as the internet is to EEO *recruitment*, the internet industry *workplace* is equally important to the media and telecom labor force that it fuels, trains and overlaps. Applying EEO rules, policies and best practices to broadband service industries is vital to ensuring that vulnerable communities are not excluded from participating in our digital society.

In *Comcast v. FCC*, the Commission attempted to assert its authority over broadband under 47 U.S.C §257, the provision Congress adopted in 1996 to require the Commission to submit triennial reports to Congress on the agency's efforts to eliminate market entry barriers.<sup>10</sup> The court found that the Commission's attempt to control Comcast's operating procedures was not reasonably ancillary to the Section 257 requirement to submit these reports to Congress.<sup>11</sup> As an example of an acceptable assertion of ancillary authority related to the Section 257 reporting requirement, the court said, "the Commission might impose disclosure requirements on regulated entities in order to gather data needed for such a report."<sup>12</sup> It follows that the Commission could reasonably exercise its ancillary authority to gather EEO data from the information service industries to complete the Section 257 mandatory report on market entry barriers. Such data gathering is a vital first step in the design and implementation of a meaningful civil rights enforcement program.

Regardless of the jurisdictional classification of broadband services and whether the Commission can regulate information service providers' EEO compliance, the Commission plainly has the authority under Section 403 of the Communications Act to institute an inquiry into any matter "concerning which any question may arise under any of the provisions of the Act...."<sup>13</sup> Thus, as the Commission considers how to best extend civil rights protections to broadband services, it

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<sup>10</sup> *See Comcast Corp. v. FCC*, 600 F.3d 642, 659 (D.C. Cir. 2010).

<sup>11</sup> *See id.*

<sup>12</sup> *See id.*

<sup>13</sup> 47 U.S.C. §403.

should institute an inquiry into industry practices to gather the facts from all stakeholders. Once the Commission has all of the facts as to how discrimination affects the broadband service industries, it can determine what measures are needed and thus craft the most effective civil rights policies for the information service industries.

The Commission can also approach its sister regulatory agencies for assistance. For example, the Commission and the EEOC could adopt a memorandum of understanding (“MOU”) similar to the one developed between these agencies in 1978, which created a system for information sharing, handling, and processing, as well as acting upon discrimination complaints.<sup>14</sup>

The principle of platform neutrality provides the basis for the Commission to extend EEO protections and reforms to all technologies – broadcast, MVPDs, non-MVPD satellites, wireline, wireless - and information services if it is jurisdictionally permissible. The Commission’s obligation to regulate in the public interest by eliminating discrimination is just as compelling in one industry as it is in any another. There are few, if any, reasons for these rules to differ from one technology to another – especially inasmuch as the executive, professional, and technical skills and labor marketplaces for these industries have come to greatly overlap as these industries’ creative, production, transmission and distribution functions have converged.<sup>15</sup>

In 2008, the Enforcement Bureau explained the policy behind platform neutrality (also known as “regulatory parity”) in the context of customer retention marketing practices:

“[r]egulatory parity, whether by increased regulation or deregulation, is important to ensure a level

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<sup>14</sup> See *Memorandum of Understanding between the Federal Communications Commission and the Equal Employment Opportunity Commission*, 70 FCC2d 2320 (1978).

<sup>15</sup> See FCC, *A New Federal Communications Commission for the 21<sup>st</sup> Century (1999)*, available at <https://transition.fcc.gov/Reports/fcc21.pdf> (last visited February 13, 2017), p. 4 (“Convergence across communications industries is already taking place, and is likely to accelerate as competition develops further. Thus, in addition to refocusing our resources on our core functions for a world of fully competitive communications markets, the FCC must also assess, with the help of Congress and others, how to streamline and consolidate our policymaking functions for a future where convergence has blurred traditional regulatory definitions and jurisdictional boundaries.”)

playing field....”<sup>16</sup> The Commission has extended regulatory parity to multiple contexts, including classifying various platforms of broadband service as information services,<sup>17</sup> prohibiting exclusivity contracts in video and telecommunications services in residential multiple tenant environments,<sup>18</sup> and, pursuant to Sections 338(a) and 338(j) of the Communications Act, establishing comparability in the cable and satellite carriage of digital-only stations.<sup>19</sup> Recently, the Commission eliminated the correspondence file and principal headend public file requirements in order to lessen the regulatory requirements imposed on commercial broadcasters and cable operators, thus advancing regulatory parity with respect to public file requirements among program distributors. The Commission noted that eliminating the correspondence file affords commercial broadcasters the same opportunity as other entities with online file requirements to provide online access to all public files, thus advancing regulatory parity.<sup>20</sup>

The principle of regulatory parity should also be extended to civil rights protections because they are as important as, and interdependent with, other regulatory objectives.

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<sup>16</sup> *Bright House Networks, LLC v. Verizon California Inc. (Recommended Decision)*, 23 FCC Rcd 5857, 5867 ¶30 (2008).

<sup>17</sup> *See id.* at 5868 ¶32, ns. 74, 78.

<sup>18</sup> *See Promotion of Competitive Networks in Local Telecommunications Markets (Report and Order)*, 23 FCC Rcd 5385, 5387 ¶5 (2008) (“In an environment of increasingly competitive bundled service offerings, the importance of regulatory parity is particularly compelling in our determination to remove this impediment to fair competition.”)

<sup>19</sup> *See Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues and Retransmission Consent Issues (Second Report and Order, Memorandum Opinion and Order, and Second Further NPRM)*, 23 FCC Rcd 5351, 5353 ¶4 (2008) (“The Commission has required carriage of digital-only stations by cable operators, and a similar requirement is both appropriate and comparable for satellite carriers.”)

<sup>20</sup> *See Revisions to Public Inspection File Requirements—Broadcast Correspondence File and Cable Principal Headend Location, MB Docket No. 16-161, Report and Order*, FCC 17-3, at 1 ¶3 and 7 ¶15 (January 31, 2017).

Finally, as we have recommended,<sup>21</sup> to ensure that a consistent nondiscrimination policy across all platforms evolves with its expertise, the Commission should create a Civil Rights Section of the Enforcement Bureau to handle tracking, compliance and enforcement of all of its EEO, transactional nondiscrimination, advertising nondiscrimination, and procurement nondiscrimination measures.<sup>22</sup> In this way, the Commission could promptly realign the staffing structure of its civil rights enforcement mechanisms under a function-specific rather than an industry-specific “silo” model, thereby embracing the concept of platform neutrality while taking a firm stance that discrimination has no place in any industry regulated pursuant to Congress’ public interest standard.

Respectfully submitted,

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<sup>21</sup> See MMTC Comments (January 29, 2017), p. 9.

<sup>22</sup> See 2014 Quadrennial Review, MB Docket No. 14-50, Second Report and Order, 31 FCC Rcd 9864, 10008 ¶333 (2016) (on remand from *Prometheus Radio Project v. FCC*, 824 F.3d 33 (3d Cir. 2016), acknowledging that “enforcement of the Media Bureau Equal Employment Opportunity rules, which is presently handled by the Media Bureau, might be more appropriate as a function of the Enforcement Bureau, given the Enforcement Bureau’s existing mission and expertise in the enforcement of the Commission’s regulations” and directing several bureaus and offices “to discuss the feasibility, implications, and logistics of shifting the enforcement of the Media Bureau Equal Employment Opportunity rules from the Media Bureau to the Enforcement Bureau.”)